STATE OF MICHIGAN

COURT OF APPEALS

MARY KNAPP,

Plaintiff-Appellee/Cross-Appellant,

v

NANCY CARD,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
July 20, 2004

No. 248468
Eaton Circuit Court
LC No. 02-000023-NO

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by leave granted the order granting plaintiff's motion for judgment notwithstanding the verdict, and plaintiff cross appeals, in this dog bite case. We reverse and remand for entry of an order reinstating the jury's verdict.

Plaintiff is defendant's next-door neighbor. Defendant has three German shepherds and a golden retriever. A five-foot high chain link fence with a top rail surrounds defendant's yard. On October 10, 2001, plaintiff was mowing her lawn when she claims that one of defendant's dogs jumped the fence and bit her on the back. According to plaintiff, she was standing approximately three feet away from the fence at the time. She did not see which dog bit her, and when she turned around immediately after feeling the bite, all four dogs were in defendant's yard. Defendant does not dispute that the physician who examined plaintiff diagnosed a dog bite and reported the injury to Eaton County Animal Control. Plaintiff had a bruise on her back and the skin was apparently broken, although her clothing was not torn or punctured.

Defendant and two other neighbors testified at trial that they had never seen defendant's dogs jump the fence but that the dogs could put their paws on the top rail of the fence. Defendant argued that there was no way that any of her dogs could have jumped over the five-foot fence, three feet into plaintiff's yard, bit plaintiff, jumped back over the fence and been casually walking around in the yard all in the span of the few seconds it took plaintiff to turn around. Defendant asserted that, at most, one of the dogs must have reached through or over the fence and scratched plaintiff, because there was no dog in plaintiff's yard when she turned around immediately after feeling the contact. Defendant also contended that plaintiff's pain was due to a preexisting condition and that plaintiff was either fabricating or exaggerating the incident because the parties had disagreed in the past with regard to property-related issues.

During deliberations, the jury sent a note to the trial judge asking if plaintiff would be entitled to damages under the dog bite statute if the dog only scratched plaintiff. Counsel for the parties agreed that the answer was "no." The jury then returned a verdict of no cause of action on the dog bite claim, but awarded plaintiff $25 for trespass.

Plaintiff moved for judgment notwithstanding the verdict, for new trial, and for directed verdict, arguing that the unrebutted evidence showed that she suffered from a dog bite, not a dog scratch. Plaintiff also claimed that defendant was obligated to raise various issues as affirmative defenses in her answer, including the issues of whether plaintiff suffered from a preexisting condition, whether plaintiff's injury was from a dog scratch as opposed to a dog bite, and whether there was a feud between the parties. The trial court agreed with regard to all but the issue of plaintiff's preexisting condition, and concluded that defendant could properly cross-examine plaintiff in that regard. Consequently, the trial court granted the motion and scheduled a new trial on the issue of damages only.

Defendant contends that the trial court erred in granting plaintiff's motion for JNOV because defendant was not required to plead as affirmative defenses any of the arguments raised by defendant during the trial. Rather, the theories attacked plaintiff's prima facie case and her credibility.

This Court reviews a decision on a motion for judgment notwithstanding the verdict de novo. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). The testimony and all legitimate inferences that may be drawn from it must be viewed in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

The trial court apparently relied on MCR 2.111(F)(2),[1] which states in relevant part:

> A party against whom a cause of action has been asserted . . . must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in a responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted.

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[1] The trial court also cited *Badalamenti v William Beaumont Hosp*, 237 Mich App 278; 602 NW2d 854 (1999), in granting the motion for JNOV, stating that "the claim by defendant that the plaintiff's injury was caused by the dog's paw was one of pure speculation or conjecture." The court's reliance on *Badalamenti* is misplaced. In *Badalamenti*, a panel of this Court held that the defendants were entitled to judgment notwithstanding the verdict because the plaintiff's expert's opinion – as well as the basis underlying the plaintiff's negligence claim – were unsupported by "substantial, legally sufficient evidence." *Id.* at 288. In that case, the plaintiff failed to meet his burden of persuasion. See *id.* at 284-285. Here, however, the court put the burden on defendant to prove that, at most, her dog scratched plaintiff, effectively requiring defendant to disprove plaintiff's claim.

Generally, the defenses to which this subrule applies are those listed in MCR 2.116(C)(7). *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). However,

> [T]he broad language employed in MCR 2.111(F), coupled with case law recognizing the existence of affirmative defenses not specifically set forth in MCR 2.111(F)(3)(a) provides adequate warning to the practitioner that defenses which go beyond rebutting the plaintiff's prima facie case, other than lack of subject matter jurisdiction and failure to state a claim, should be stated in the [first] responsive pleading, lest they be deemed to have been waived. [*Campbell v St John Hospital*, 434 Mich 608, 616; 455 NW2d 695 (1990); see also 2A Moore, Federal Practice, ¶ 8.27[3], p 8-182 ("Any matter that does not tend to controvert the opposing party's prima facie case as determined by applicable substantive law should be pleaded [as an affirmative defense]").]

Thus, under the applicable case law, MCR 2.111(F) applies only to affirmative defenses, and not those defenses that challenge a plaintiff's prima facie case.

Black's Law Dictionary (6th ed), p 38, distinguishes an affirmative defense as one "which attacks the plaintiff's *legal* right to bring an action, as opposed to attacking the truth of the claim." In this case, defendant's arguments regarding the possibility that the dog merely reached over the fence and scratched plaintiff and plaintiff's possible motive to fabricate or exaggerate her claim went to the truth of the matter rather than attacking plaintiff's legal right to bring the claim. Thus, the trial court erred in holding that these defenses were waived because they were not raised in defendant's responsive pleadings.

Defendant was also not required to affirmatively prove that plaintiff's injury was the result of a dog scratch rather than a dog bite. In this regard, the trial court's decision improperly shifted the burden of proof to require defendant to establish that the dog did not bite plaintiff but only scratched her. The jury saw the photographs of plaintiff's injury and apparently concluded that the injury could have been from a dog's paw rather than its teeth, and decided that plaintiff did not prove her case by a preponderance of the evidence.

Consequently, the trial court erred in granting plaintiff's motion for JNOV because the jury's conclusion regarding what happened reflects a rational view of the testimony. *Severn*, *supra* at 412. If, as plaintiff asserted, she was standing three feet away from the fence when she was allegedly bitten, a dog could not possibly have jumped over a five foot fence, bitten her, and been back in the yard by the time she turned around. However, one of the dogs could have climbed the fence, reached out with its paw, scratched plaintiff, and been back on the ground by the time she turned around. The fact that the doctor who treated plaintiff diagnosed a dog bite is not dispositive, as plaintiff argues, because the diagnosis was made on the basis of plaintiff's version of the incident. Consequently, the court erred in granting the motion.

On cross-appeal, plaintiff argues that the trial court erred by allowing evidence regarding defendant's dogs' history of jumping over the fence between the parties' properties. Plaintiff failed to object to this testimony below. Therefore, our review is limited to plain error affecting substantial rights. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999). We find no error because the neighbor's testimony was probative of whether the dogs either had or were able to jump the fence, an issue directly relevant to the theories of both

parties. MRE 401. See *Kubisz*, *supra* at 637. The remaining arguments raised on cross appeal are deemed abandoned because they are inadequately briefed. See *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Reversed and remanded for entry of an order reinstating the jury's verdict. Jurisdiction is not retained.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra